

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOEY DESHAUN CLARK,

Defendant.

2:07-cr-00007 KJD-RJJ

REPORT & RECOMMENDATION  
OF UNITED STATES  
MAGISTRATE JUDGE

(Defendant's Motion to Suppress #18)

This matter came before the Court on Defendant, Joey Deshaun Clark's Motion to Suppress Evidence For Fourth and Fifth Amendment Violation (#18). The Court has considered Defendant's Motion (#18), the Government's Response (#22), and the testimony and evidence presented at the evidentiary hearing.

**BACKGROUND**

The defendant, Joey Deshaun Clark was indicted by the Federal Grand Jury and charged with being a felon in possession of a firearm. The indictment was the result of weapons found after a police officer conducted a pat-down search on Defendant during a traffic stop on February 25, 2007. The charge is based on a Ruger 9 mm pistol, and a Kel Tec .380 caliber pistol found on Clark during the traffic stop.

The testimony at the hearing, established that on February 25, 2007, at approximately 12:40 p.m., North Las Vegas Police Officer Leonard Miller was on patrol in a marked police car.. Officer Miller was headed northbound on West Street when he saw a white 1994 Cadillac, Nevada license plate number 739UBD, traveling southbound approach. From two prior contacts, Officer Miller

1 recognized the passenger in the vehicle as Joey Deshaun Clark. Officer Miller looked into his rear-  
2 view mirror, after the Cadillac passed, and noticed that the driver of the Cadillac failed to use its  
3 right-turn signal while turning right onto Cartier Street. Officer Miller turned his marked patrol car  
4 around and headed towards the Cadillac. While Officer Miller drove down Cartier Street, behind  
5 the Cadillac, he noticed that when the vehicle stopped at the next stop sign located at Cartier Street  
6 and Clayton, the left brake tail lamp on the vehicle did not work. At this point, Officer Miller  
7 activated his overhead lights and siren and saw Defendant, in the front right passenger seat, look  
8 back and then bend down as though reaching underneath his seat. Officer Miller, concerned for his  
9 safety, called dispatch and requested back-up.

10       Once the vehicle was stopped, Officer Miller approached the Cadillac and requested from  
11 the driver, Crystal Clemons, her driver's license, registration, and proof of insurance. Ms. Clemons  
12 informed Officer Miller that she did not have a current Nevada driver's license. Officer Miller then  
13 asked for some other form of identification to which Ms. Clemons produced a Nevada identification  
14 card. Ms. Clemens informed Officer Miller that the Cadillac was owned and registered to the  
15 Defendant. She produced the registration which showed registration in Defendant's name. Officer  
16 Miller proceeded to ask Defendant if the vehicle was insured and whether the Defendant had a valid  
17 driver's license. Defendant provided his Nevada driver's license and Officer Miller identified him  
18 as Joey Deshaun Clark. Based on Defendant's suspicious behavior at the time of the stop, Officer  
19 Miller asked both the driver and the Defendant for consent to search the vehicle, and both consented.

20       Officer Miller returned to his patrol car, walking backwards, to run a check on both the  
21 driver and the passenger. While the individual checks were returning, Officers Cordova, Hafen, and  
22 Chee arrived on the scene. Officer Miller informed the other officers that he was nervous because  
23 Defendant appeared to reach under his seat when he initiated the stop. Officer Miller walked to the  
24 driver's side of the Cadillac and asked Ms. Clemons to exit the vehicle. Officers Cardovo and Hafen  
25 approached the passenger's side of the vehicle and began talking to Defendant. Ms. Clemons  
26 stepped out of the car and walked to the front of Officer Miller's patrol car. Officer Miller asked  
27 Officer Chee, a female, to pat-down Ms. Clemons for safety reasons. After the pat-down was  
28 conducted, Officer Miller explained to Ms. Clemons why she was being cited. Officer Miller asked

1 Officer Cordova to have Defendant Clark exit the Cadillac in order to search the vehicle. Officer  
2 Cordova told Defendant to exit the vehicle. Instead of exiting the vehicle, Clark slid across the seat  
3 to the driver's side of the vehicle. Officer Hafen quickly moved to the driver's side of the vehicle.  
4 Officer Hafen became concerned by Defendant's behavior and asked Defendant once again to exit  
5 the vehicle. Defendant exited the vehicle. Officer Hafen then conducted a pat-down on Defendant  
6 for safety reasons. During the pat-down of Defendant, Officer Hafen felt a gun in Defendant's  
7 waistband and informed the other officers of a "413," the code for weapons. Officer Hafen placed  
8 handcuffs on Clark and then removed two weapons from the Defendant's waistband, a Ruger 9 mm  
9 pistol, and a Kel Tec .380 caliber pistol. Officer Miller secured the weapons. Officer Miller testified  
10 that the duration, from the beginning of the stop until the weapons were found, was approximately  
11 ten minutes.

12 Defendant was seated on the sidewalk curb. Officers Hafen and Chee began an inventory  
13 of the vehicle. Defendant began talking to Officer Miller stating, "I need to get out of this." Officer  
14 Miller responded by stating to Defendant, "tell the truth." Defendant then began to speak freely but  
15 Officer Miller stopped Defendant and read Defendant his Miranda rights. Officer Miller asked  
16 Defendant whether he understood these rights and Defendant stated that he understood his rights.  
17 Officer Miller then asked Defendant, "having these rights in mind, do you wish to still talk to me?"  
18 Clark stated, "yes," and began to tell Officer Miller incriminating statements.

19 First, the Court must determine whether Officer Miller's actions constituted an unreasonable  
20 seizure within the Fourth Amendment. Second, whether the search conducted on Defendant was  
21 lawful. Third, whether the scope of the traffic stop was constitutional. Lastly, whether Clark's  
22 statements were made in violation of Defendant's Fifth Amendment rights.

### 23 DISCUSSION

24 The Fourth Amendment provides, in pertinent part, "[t]he right of the people to be secure in  
25 their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST.  
26 amend. IV. The Supreme Court has stated that "[n]o right is held more sacred, or is more carefully  
27 guarded, by the common law, than the right of every individual to the possession and control of his  
28 own person, free from all restraint or interference of others, unless by clear and unquestionable

authority of law.” Terry v. Ohio, 392 U.S. 1, 9 (1968). This right protects people, and wherever a person may harbor a reasonable expectation of privacy, from all unreasonable searches and seizures. Terry, 392 U.S. at 9. If a search or seizure is conducted without probable cause or without being executed by a valid search warrant, an individual’s Fourth Amendment rights are violated. Katz v. United States, 389 U.S. 347, 357 (1967).

### **I. Officer Miller’s Traffic Stop**

The Ninth Circuit holds that “[a]n automobile stop by police is a seizure within the meaning of the Fourth Amendment . . . [and s]uch a stop is subject to the constitutional requirement that it not be unreasonable.” United States v. Garcia, 205 F.3d 1182, 1186 (9th Cir. 2000). However, “if the officer had probable cause to believe that a traffic violation had occurred, the seizure is [considered] reasonable.” Garcia, 205 F.3d at 1186-87. Moreover, an officer may stop a vehicle, based on the totality of the circumstances, if the officer has a reasonable or well-founded suspicion. United States v. Olafson, 213 F.3d 435, 439 (9th Cir. 2000). “Reasonable suspicion exists when an officer is aware of specific, articulable facts, which, together with objective and reasonable inferences, form a basis for suspecting that the particular person to be detained has committed or is about to commit a crime.” Olafson, 213 F.3d at 439. In the Ninth Circuit, a traffic violation alone is sufficient to establish reasonable suspicion. United States v. Choudhry, 461 F.3d 1097, 1100-01(9th Cir. 2006).

In the present matter, Officer Miller had probable cause to stop Defendant’s Cadillac. While Officer Miller observed the Cadillac, two traffic violations occurred. These violations are found in Nevada Revised Statutes §§ 484.343 and 484.555 (2007). Section 484.343 provides, in pertinent part, that:

A driver shall not turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety, and then only after giving a clearly audible signal by sounding the horn if any pedestrian may be affected by such movement and after giving an appropriate signal if any other vehicle may be affected by such movement.

NEV. REV. STAT §484.343 (2007). Section §484.555 provides, in pertinent part, that “every motor vehicle . . . must be equipped with two or more stop lamps . . . [and] must . . . [b]e activated upon

application of the brake.” NEV. REV. STAT §484.343 (2007). Since Officer Miller observed two alleged traffic violations, sufficient reasonable suspicion for a stop was established. Choudhry, 461 F.3d at 1100-01. At the hearing, the driver of the car, Crystal Clemons testified that the turn signal was defective but that she activated it manually. Transcript (#44) at 7, lines 18-21 and at 16, lines 10-17. However, neither Ms. Clemons, nor anyone else checked to see if manipulating the turn signal actually caused it to blink, signaling a turn. Transcript (#44) at 31, lines 10-15. Officer Miller’s stop of the vehicle was lawful and not an unreasonable seizure within the meaning of the Fourth Amendment.

## II. Warrantless Search

According to the Fourth Amendment, the Government may not search a person unless a valid search warrant is executed; however, certain exceptions exist for this rule. Katz, 389 U.S. at 357. A warrantless search is permissible if it falls within one of the “specifically established and well-delineated exceptions.” Katz, 389 U.S. at 357. Two established and well-delineated exceptions, relating to the case at hand, are: (1) pat-down searches as outlined in Terry, 392 U.S. at 27; and (2) searches conducted after consent is given. Florida v. Jimeno, 500 U.S. 248, 250-51 (1991).

### (1) Warrantless Pat-down Search

The Supreme Court in Terry concluded that officers may conduct a “reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.” Terry, 392 U.S. at 27. This authority must be narrowly drawn to conduct a warrantless protective pat-down search justified by reasonable suspicion of possible danger. Terry, 392 U.S. at 27. It is not necessary that the officer be absolutely certain that the individual is armed but based on whether “a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.” Terry, 392 U.S. at 27. Moreover, in determining “whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or ‘hunch,’ but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.” Terry, 392 U.S.

1 at 27. Ultimately, it is within the discretion of the officer “to control the situation as he or she deems  
2 necessary to ensure the safety of the officer and the vehicle occupants.” United States v. Williams,  
3 419 F.3d 1029, 1031 (9th Cir. 2005). To this end, an officer is allowed, in a lawful traffic stop, to  
4 order both the driver and the passenger out of the vehicle to conduct a warrantless pat-down search  
5 for weapons. Maryland v. Wilson, 519 U.S. 408, 415 (1997).

6 In the present matter, Officer Miller’s warrantless pat-down search was reasonable. The  
7 specific observations and knowledge of Officer Miller, included Clark’s prior conviction of felon  
8 in possession of a firearm, Defendant kept looking back, and Defendant seemed to reach underneath  
9 his seat as if he were grabbing or hiding something during the stop. Officer Miller was concerned  
10 for his safety. Officer Miller had full discretion to keep the driver and Defendant in the vehicle or  
11 have them come out. However, Officer Miller felt safer to have them stay inside the vehicle until  
12 back-up arrived. In order for a pat-down to be valid, reasonable suspicion of possible danger must  
13 be present, and it was here. It is inconsequential that Officer Miller did not have the driver and  
14 Defendant step out of the vehicle at the outset of the stop. The Court finds that sufficient reasonable  
15 suspicion was shown to conduct a pat-down search of Clark

## 16 **(2) Consent Search**

17 “It is well settled that a search conducted pursuant to a valid consent is constitutionally  
18 permissible.” United States v. Soriano, 361 F.3d 494, 501 (9th Cir. 2004). The Supreme Court has  
19 “long approved consensual searches because it is no doubt reasonable for the police to conduct a  
20 search once they have been permitted to do so.” Jimeno, 500 U.S. at 251. The government bears  
21 the burden to show that consent to a warrantless search was voluntary. Jimeno, 500 U.S. at 251; see  
22 also Soriano, 361 F.3d at 501. The validity of a person’s consent is a question of fact, and its  
23 resolution depends upon the totality of the circumstances. United States v. Cormier, 220 F.3d 1103,  
24 1112 (9th Cir. 2000). The Ninth Circuit considers several factors to determine whether a person  
25 freely consents to a search: “(1) whether the defendant was in custody; (2) whether the arresting  
26 officers had their guns drawn; (3) whether Miranda warnings were given; (4) whether the defendant  
27 was told he had a right not to consent; and (5) whether the defendant was told that a search warrant  
28 could be obtained.” Cormier, 220 F.3d at 1112. However, there is no single controlling factor.

1 United States v. Kaplan, 895 F.2d 618, 622 (9th Cir. 1990). These factors are merely guideposts,  
2 not a mechanized formula to resolve the voluntariness inquiry. Soriano, 361 F.3d at 502. No one  
3 factor is determinative because just as “every encounter has its own facts and its own dynamics . .  
4 . so does every consent.” United States v. Morning, 64 F.3d 531, 533 (9th Cir. 1995).

5 In the present matter, based on the totality of the circumstances and after considering the  
6 applicable factors, the Court concludes that Defendant voluntarily consented to the search of the  
7 Cadillac. Clark was not in custody when consent was given to search his vehicle. Second, Officer  
8 Miller’s gun was not drawn when he asked for the Defendant’s consent. Third, because Clark was  
9 not in custody, it was unnecessary for Officer Miller to give Defendant Miranda warnings before  
10 asking for consent to search. Soriano, 361 F.3d at 504.

11 There was no indication that Defendant was told that he had a right not to consent. The Ninth  
12 Circuit has held that voluntary consent is not invalidated just because a police officer fails to: (1) tell  
13 the suspect that he can refuse consent; (2) give Miranda warnings; and (3) inform the suspect that  
14 a search warrant could be obtained. Cormier, 220 F.3d at 1113. In Cormier, the Ninth Circuit  
15 determined that since Cormier had a “very long, detailed and thorough experience with law  
16 enforcement,” it lessened “the impact of the two absent factors because it increases the likelihood  
17 that Cormier was already aware of his rights to refuse consent and to remain silent.” Cormier, 220  
18 F.3d at 1113. In the case at hand, Clark had previously been arrested for felon in possession of a  
19 firearm. His prior experience with law enforcement “lessens” the impact of not being told that he  
20 had a right not to consent to the search. Based on the totality of the circumstances, the Court is not  
21 persuaded that Defendant’s consent was not voluntary because he was not told that he had a right  
22 not to consent.

23 Lastly, Officer Miller did not tell Clark that a search warrant could be obtained. Defendant’s  
24 argument that the presence of additional police officers called to the scene has the same threatening  
25 effect as being told that a search warrant could be obtained is inapposite. Based on the totality of  
26 the circumstances, the Court finds that Defendant’s consent to the search was the product of an  
27 essentially free and unconstrained choice.

### 28 III. Scope of the Traffic Stop

1           The Supreme Court has held that, during an investigatory detention, police contact must be  
2 reasonably related in scope to the circumstances which initially justified the detention. Terry, 392  
3 U.S. at 20. The Ninth Circuit holds that “[t]he length and scope of detention must be justified by  
4 the circumstances authorizing its initiation.” Pierce v. Multnomah County, 76 F.3d 1032, 1038 (9th  
5 Cir. 1996). Once “an officer has obtained sufficient information to issue a citation, a continued  
6 detention without probable cause to arrest for a crime is unreasonable.” Pierce, 76 F.3d at 1038.  
7 However, an “officer’s subjective intentions do not make continued detention illegal, so long as the  
8 detention is justified by the circumstances viewed objectively.” Ohio v. Robinette, 519 U.S. 33  
9 (1996).

10           When passengers are involved in a detention, the reasonableness of the governmental  
11 detention depends on a balance between the public interest and the individual’s right to personal  
12 security free from arbitrary interference by officers. Maryland, 434 U.S. at 413. On the public  
13 interest side is officer safety. Maryland, 434 U.S. at 413. On the personal liberty side “the case for  
14 passengers is stronger than that for the driver in the sense that there is probable cause to believe that  
15 the driver has committed a minor vehicular offense but there is no such reason to stop or detain  
16 passengers.” Maryland, 434 U.S. at 413. However, “as a practical matter, the passengers are already  
17 stopped by virtue of the stop of the vehicle . . . [t]he only change in their circumstances which will  
18 result from ordering them out of the car is that they will be outside of, rather than inside of, the  
19 stopped car.” Maryland, 434 U.S. at 413-14.

20           In the case at hand, Clark argues that the traffic stop was unreasonable because the scope of  
21 the detention was not tailored to its initial justification which in turn prolonged the detention of the  
22 Defendant, who was the passenger. However, the Defendant prolonged his detention by giving  
23 consent to have his vehicle searched. He was not only the passenger in the vehicle, but also the  
24 owner of the vehicle. When consent was given to allow Officer Miller to search Clark’s vehicle, the  
25 scope of the detention was extended. The Ninth Circuit states that “[a] suspect is free, however, after  
26 initially giving consent to delimit or withdraw his or her consent at anytime.” United States v.  
27 McWeeney, 454 F.3d 1030, 1034 (9th Cir. 2006). When a person fails to limit the consent as to  
28 duration, it is implicitly limited by the person’s right to withdraw his consent. McWeeney, 454 F.3d



1 at 1034; see also United States v. Mitchell, 82 F.3d 146, 151 (7th Cir. 1996) (noting that consent  
 2 remains valid and all seized items are admissible when a suspect does not withdraw his valid consent  
 3 to a search before the discovery of that item). Here, the Defendant did not at any time withdraw his  
 4 consent to have his vehicle searched. The consent given by Clark prolonged the detention until the  
 5 search was concluded or the consent was withdrawn.

6 Moreover, the search was justified due to the public interest of officer safety. Clark had  
 7 made suspicious movements that gave rise to Officer Miller's request for consent to search the car.  
 8 Officer Miller's contact was reasonably related in scope to the circumstances which initially justified  
 9 the detention. Viewing the circumstances objectively, Officer Miller's subjective intention to search  
 10 the vehicle was justified by the circumstances. The Court finds that the traffic stop was reasonable  
 11 and that the scope of the detention was tailored to its initial justification.

#### 12 **IV. Incriminating Statements**

13 The Fifth Amendment provides, in pertinent part, that "[n]o person . . . shall be compelled  
 14 in any criminal case to be a witness against himself." U.S. CONST. amend. V. It has long been  
 15 established that "when an individual is taken into custody or otherwise deprived of his freedom by  
 16 the authorities in any significant way and is subjected to questioning, the privilege against  
 17 self-incrimination is jeopardized." Miranda v. Arizona, 384 U.S. 436, 478 (1966). To avoid this  
 18 deprivation, four warnings were established to protect individuals from self-incrimination: (1) a  
 19 suspect has the right to remain silent; (2) anything said by the suspect may be used against him in  
 20 a court of law; (3) the suspect has the right to have the presence of an attorney; and (4) if the suspect  
 21 cannot afford an attorney, one will be appointed for him prior to the questioning. Miranda, 384 U.S.  
 22 at 478-79. The police officer giving the warnings are not required to recite the warnings precisely,  
 23 as long as they are clearly given and clearly understood. Duckwork v. Eagan, 492 U.S. 195, 203  
 24 (1989). Once the warnings are given, a suspect may voluntarily, knowingly, and intelligently waive  
 25 these rights. Miranda, 384 U.S. at 444. However, the government bears the heavy burden in proving  
 26 that the suspect's waiver was done voluntarily and was made with full "knowledge essential to his  
 27 ability to understand the nature of his rights and the consequences of abandoning them." Moran v.  
 28 Burbine, 475 U.S. 412, 424 (1986). In determining whether a lawful waiver was given, courts look

1 to the totality of the circumstances “to ascertain whether the accused in fact knowingly and  
2 voluntarily decided to forgo his rights.” Fare v. Michael C., 442 U.S. 707, 725 (1979).

3 In the present case, the Court finds that Defendant voluntarily, knowingly, and intelligently  
4 waived his Fifth Amendment rights. Officer Miller clearly read the Defendant his Miranda warnings  
5 verbatim as found on his Miranda card and then asked Clark, “having these rights in mind, do you  
6 wish to still talk to me?” Clark freely and willingly stated, “Yes.” The Court is persuaded that Clark  
7 understood these rights when Officer Miller recited them because this was not Defendant’s first run-  
8 in with law enforcement. Similar to the Cormier analysis above, the Defendant had a “very long,  
9 detailed and thorough experience with law enforcement.” Cormier, 220 F.3d at 1113. Defendant  
10 was free to say no; however, he knowingly waived his Fifth Amendment rights. Clark did not ask  
11 to speak with an attorney and was not coerced or threatened to speak with Officer Miller. Officer  
12 Miller did not have his gun drawn, rather the evidence presented to the Court showed that both  
13 Officer Miller and Clark were calm during the entire incident. Moreover, there was no evidence that  
14 Clark was under the influence of any substance that would affect his ability, judgment, or decision  
15 to speak. Based on the totality of the circumstances, Clark voluntarily, knowingly, and intelligently  
16 waived his Fifth Amendment rights against self incrimination. The Court finds that Defendant’s  
17 incriminating statements were given by “rational intellect and free will”. Blackburn v. Alabama, 361  
18 U.S. 199, 208 (1960).

### 19 CONCLUSION

20 The Court concludes that: (1) Officer Miller’s actions constituted a reasonable seizure within  
21 the Fourth Amendment; (2) the warrantless pat-down search conducted on Defendant was lawful;  
22 (3) the scope of the traffic stop was constitutional; and (4) Defendant waived his Fifth Amendment  
23 rights against self-incrimination. Since no unlawful search or seizure occurred, Defendant’s Motion  
24 to Suppress (#18) should be denied.

### 25 RECOMMENDATION


26 Based on the foregoing and good cause appearing therefore,

27 IT IS THE RECOMMENDATION of the undersigned Magistrate Judge that the  
28 Defendant’s Motion to Suppress (#18) be **DENIED**.

NOTICE

Pursuant to Local Rule IB 3-2 **any objection to this Report and Recommendation must be in writing and filed with the Clerk of the Court on or before January 4, 2008.** The Supreme Court has held that the courts of appeal may determine that an appeal has been waived due to the failure to file objections within the specified time. Thomas v. Arn, 474 U.S. 140, 142 (1985). This circuit has also held that (1) failure to file objections within the specified time and (2) failure to properly address and brief the objectionable issues waives the right to appeal the District Court's order and/or appeal factual issues from the order of the District Court. Martinez v. Ylst, 951 F.2d 1153, 1157 (9th Cir. 1991); Britt v. Simi Valley United Sch. Dist., 708 F.2d 452, 454 (9th Cir. 1983).

DATED this 21st day of December, 2007.

  
ROBERT J. JOHNSTON  
United States Magistrate Judge